It is possible that the court felt that if it gave full force to the words of the amendment in the matter of the salaries of the judges, it would be difficult to refuse them that force in the matter of income derived from state and municipal bonds. The court might well hesitate to commit itself to the latter, for, apart from its legal aspect, such a decision would be of striking significance in the financial and economic world.[13] To avoid this difficulty an opinion was given indicating that the words "from whatever source derived" are of no force at all, because foreign to the immediate purpose of the amendment.

It is suggested that a sounder solution of the problem can be found in the principle which requires express terms to effect startling changes, and denies that such changes can be introduced by the mere force of general language.[14] On this principle it would be hard to say that the change that would result from compelling federal judges to pay an income tax on their salaries could be termed startling and revolutionary. Such a change would not suddenly expose the judiciary to the tyranny of the Congress.[15] On the other hand, if the question arises whether the amendment gives Congress the power to tax income derived from state and municipal bonds, there would be good ground for holding that it did not. For it has been held repeatedly that Congress cannot levy such taxes,[16] and that the states are equally powerless to tax federal instrumentalities.[17] Furthermore, these decisions rest on no express words of the Constitution, but upon the very base and frame of our government as set forth in that instrument.[18] To interfere with that frame might well be held a startling and revolutionary change. This view makes it possible to limit the effect of the amendment without an extreme disregard of its literal meaning.

THE SEVENTH AMENDMENT AND PARTIAL NEW TRIALS. — The agitation for procedural reform and in some measure its realization make it pertinent to inquire how far the Seventh Amendment of the Federal Constitution, guaranteeing the right to jury trial,[1] may prove a stumbling-block in the way of such progress. Though the Seventh Amendment

[13] Exemption from taxation puts a premium on state and municipal bonds, thus forcing up the rate of interest at which railroads and other industrial organizations can borrow.

[14] Cope *v.* Doherty, 2 DeG. & J. 614 (1858); Kneil *v.* Egleston, 140 Mass. 202 (1885). See State *v.* Brown, 71 W. Va. 519, 523, 77 S. E. 243, 245 (1885); Woolridge *v.* M'Kenna, 8 Fed. 650, 659 (1881).

[15] The power to levy a general income tax, which would incidentally include the salaries of the judges, would be but a clumsy weapon in the hands of Congress, compared to the power, already possessed, of refusing to make the necessary appropriations to pay them any salary at all.

[16] Pollock *v.* Farmers Loan & Trust Co., *supra;* United States *v.* Railway Co., 17 Wall. (U. S.) 322 (1873).

[17] M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819); Farmers Bank *v.* Minnesota, 232 U. S. 516 (1914).

[18] See Dobbins *v.* Commissioners, 16 Pet. (U. S.) 435, 447 (1842).

[1] The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, than according to the rules of common law."

does not apply to state courts,[2] the state constitutions almost universally contain similar provisions and raise identical constitutional questions.[3] It is well established that the Seventh Amendment and similar state constitutional provisions guarantee the right to jury trial as it existed when the respective provision was adopted,[4] and further that they guarantee the substance rather than the mere form of the right.[5] Though the number of jurors — namely, twelve,[6] the impartiality of the jury,[7] and the unanimity of its decision,[8] are recognized as essential ingredients, much uncertainty exists as to what is form and what is substance.[9]

The *Slocum* case,[10] holding that a judgment entered notwithstanding the verdict by an appellate court is a violation of the Seventh Amendment, has been severely criticized.[11] The case finds its echo in a decision of the Circuit Court of Appeals of the Third Circuit,[12] which holds that to submit a case on retrial to a new jury on the single issue of damages, which were inadequately found by the first jury, is an infringement of the right to jury trial as guaranteed by the Seventh Amendment.[13] The objection to a rigid interpretation of the Constitution was well put by Justice Hughes in his dissenting opinion in the *Slocum* case,[14] where he says: "It [the decision] erects an impassable barrier, unless the Constitution be amended, to actions of Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and the expense of litigation." It is true that the practice of a partial new trial was unknown at the time of the adoption of the Federal Constitution.[15] But this fact cannot be conclusive as to whether the right to have the same jury pass on all issues is a substantial or a non-essential part of the right. Those decisions commend themselves to reason that hold that whether the same or different juries pass upon the different issues is a matter of form

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[2] Walker *v.* Sauvinet, 92 U. S. 90 (1875); Minn. & St. Louis Ry. Co. *v.* Bombolis, 241 U. S. 211 (1916).

[3] For state constitutional provisions, see 2 THOMPSON, TRIALS, 2 ed., § 2226.

[4] East Kingston *v.* Towle, 48 N. H. 57 (1868); Thompson *v.* Utah, 170 U. S. 343 (1898); Knee *v.* Balt. City Ry. Co., 87 Md. 623, 40 Atl. 890 (1898); Traction Co. *v.* Hof, 174 U. S. 1 (1899).

[5] Haines *v.* Levin, 51 Pa. St. 412 (1866); Walker *v.* N. M. & So. Pac. Ry. Co., 165 U. S. 593 (1897).

[6] Holmes *v.* Walton, 4 Amer. Hist. Rev. (N. J.) 456 (1780); Opinion of the Judges, 41 N. H. 550 (1860); Thompson *v.* Utah, *supra.*

[7] Gibbs *v.* State, 3 Heisk. (Tenn.) 72 (1871); People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572 (1899).

[8] Opinion of the Judges, 41 N. H. 550, *supra;* Amer. Pub. Co. *v.* Fisher, 166 U. S. 464 (1897); Springville *v.* Thomas, 166 U. S. 707 (1897).

[9] For a discussion of this subject, see Austin Scott, "Trial by Jury and the Reform of Civil Procedure," 31 HARV. L. REV. 669.

[10] Slocum *v.* N. Y. Life Ins. Co., 228 U. S. 364 (1913).

[11] See J. L. Thorndike, "Trial by Jury in the United States Courts," 26 HARV. L. REV. 732; Ezra R. Thayer, "Judicial Administration," 63 U. OF PA. L. REV. 585; REPORT AMER. BAR ASSOC., 1913, 561. But supporting the case see Henry Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 287, 381, 465.

[12] McKeon *v.* Central Stamping Co., 264 Fed. 385 (Cir. Ct. App.) (1920). See RECENT CASES, p. 86, *infra.*

[13] See Austin Scott, "Progress of the Law (Civil Procedure)," 33 HARV. L. REV. 236, 249.

[14] See Slocum *v.* N. Y. Life Ins. Co., 228 U. S. 364, 400, *supra.*

[15] Parker *v.* Godin, 2 Strange, 813 (1729).

and not of substance.[16] Though, as objected by the Circuit Court of Appeals, the judgment represents a combination of jury findings, it is nevertheless true that all the facts of the case have been passed upon by the recognized triers of fact — a jury. If the issues are distinct, and the error confined to part of the issues only,[17] distinct findings by distinct juries can hardly be prejudicial to either party. Where an error has been committed in part only of the trial, it has been insisted in a well-known opinion [18] that the right is not to a new trial, but to the correction of the error. The constitutional guarantee of the re-examination of fact according to the common law does not require a re-examination of all the issues. It was even asserted in the same opinion that to set aside a verdict on the issues correctly found as well as those incorrectly found is not only unjust to the successful party, but arbitrary as well.

It is moreover difficult to reconcile the opinion of the Circuit Court of Appeals with the prevailing practice of *remittiturs*, recognized not only as valid in state courts,[19] but likewise as constitutional in federal practice by the Supreme Court.[20] Without constitutional infringements,[21] it is thus possible by a *remittitur* not simply to set aside the verdict in so far as it pertains to damages, but to reduce the finding of damages, and enter judgment on the reduced verdict, without any possibility of new trial except in so far as the plaintiff refuses to consent to the reduction. It is difficult, therefore, to see how the unconditional resubmission of the issue of damages to a new jury can cause offense.

But to turn to cases more directly in conflict with the decision of the Circuit Court of Appeals, it is now the common practice in state courts to grant partial new trials. The result, reached partly by statute[22] and partly by judicial decision,[23] has been attained without constitutional

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[16] Bennett *v.* State, 57 Wis. 69, 14 N. W. 912 (1883); Smith *v.* Western Pac. Ry., 203 N. Y. 499, 96 N. E. 1106 (1911).

[17] Of course where the error taints all the issues as in a compromise verdict, a complete new trial should be granted. Doody *v.* B. & M. Ry., 77 N. H. 161, 89 Atl. 487 (1914); Waucantuck Mills *v.* Magee Co., 225 Mass. 31, 113 N. E. 573 (1916).

[18] Lisbon *v.* Lyman, 49 N. H. 553 (1870).

[19] Burdict *v.* Mo. Pac. Ry., 123 Mo. 221, 27 S. W. 453 (1894); Trow *v.* Village of White Bear, 78 Minn. 432, 80 N. W. 1117 (1899); Willette *v.* Rhinelander Paper Co., 145 Wis. 537, 130 N. W. 853 (1911); Louisville & N. Ry. *v.* Frank, 80 So. (Fla.) 60 (1918).

[20] Arkansas Valley, etc. Co. *v.* Mann, 130 U. S. 69 (1889); Gila Valley Ry. *v.* Hall, 232 U. S. 94 (1914).

[21] *Cf.* Watt *v.* Watt (1905), A. C. 115, where a *remittitur* was held a denial of defendant's right to a jury trial. But in Barber & Co. *v.* Deutche Bank & Co. (1919), A. C. 304, a remittitur was allowed where an error led to a virtually liquidated amount being included in the verdict.

[22] Hartman *v.* Baldwin, 103 Kan. 764, 176 Pac. 115 (1918). See 1909 KANSAS LAWS, § 307. New Jersey has a similar statute; see 1912 NEW JERSEY LAWS, § 73.

[23] Duff *v.* Duff, 101 Cal. 1, 35 Pac. 437 (1894); Ga. Ry. & Banking Co. *v.* Daniel, 89 Ga. 463, 15 S. E. 538 (1892); Kessans *v.* Kessans, 58 Ind. App. 437, 108 N. E. 380 (1915); Case Threshing Machine Co. *v.* Fisher, 144 Iowa, 45, 122 N. W. 575 (1909); McKay *v.* N. E. Dredging Co., 93 Me. 201, 44 Atl. 614 (1899); Pratt *v.* Boston, etc. Co., 134 Mass. 300 (1883); Schroeder *v.* Edwards, 205 S. W. (Mo.) 47 (1918); Helvetia Copper Co. *v.* Hart Parr Co., 171 N. W. (Minn.) 272 (1919); Ramsdell *v.* Clark, 20 Mont. 103 (1897); Lisbon *v.* Lyman, *supra;* Schlitz Brewing Co. *v.* Ester, 86 Hun (N. Y.), 22, 33 N. Y. Supp. 143 (1895); Lake *v.* Bender, Adm., 18 Nev. 361 (1884); Benton *v.* Collins, 125 N. C. 83, 34 S. E. 242 (1899); Clark *v.* N. Y., N. H., & H. Ry., 33 R. I. 83, 80 Atl. 406 (1911); Laney *v.* Bradford, 4 Rich. (S. C.) 1 (1850); Spawn

misgivings. The Massachusetts court has expressly declared a statute conferring the right to grant a partial new trial constitutional.[24] Moreover, the practice is not unknown in some federal courts in cases in which part of the issues only have been affected by some error of law in the trial or by some defect in the verdict.[25] The United States Supreme Court has not yet passed upon the question. When this question does squarely come before it, it is to be hoped that it will then allay the constitutional doubts now seemingly in the way of a procedural simplification as wise as it is expedient.

STARE DECISIS. — The doctrine of *stare decisis* is based upon the principle that certainty in law is preferable to reason and correct legal principles. This idea has become so firmly fixed in England that the House of Lords [1] and the Court of Appeal [2] hold that they have no power to reverse themselves on a proposition of law, no matter how erroneous their previous decision may have been. Practically all American jurisdictions, however, apply the doctrine with less and less rigidity, so that an overruled decision is by no means uncommon. The explanation of this difference in opinion is simple.

The varying conditions which exist in America geographically and politically have caused American jurisdictions to reconstruct many of the old common-law principles and to depart from them absolutely when expediency makes a change advisable. The different tests to determine navigability of streams on the question of the extent of admiralty jurisdiction,[3] the law as to liability of owners of domestic animals for trespass upon unfenced land,[4] and the riparian and priority doctrines as to the use of water [5] are but a few of the instances where courts have completely changed existing principles of law by the force of their decisions. Such departures are unquestionably wise. But the difficult situation arises where conditions have been altered but slightly, and yet upon the most careful consideration the old legal doctrine seems wrong although it has been reiterated in decision after decision. It is such situations which cause courts the greatest anxiety. The admission of the House of Lords that it cannot reverse itself on a proposition of law is one of weak-

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v. S. D. Cent. Ry., 26 S. D. 1, 127 N. W. 648 (1910); Auwater *v.* Kroll, 79 Wash. 179, 140 Pac. 326 (1914); Moss *v.* Campbell's Ry., 75 W. Va. 62, 83 S. E. 721 (1914). See More-Jones Glass Co. *v.* W. J., etc. Ry., 47 Vroom (N. J.), 9, 10, 69 Atl. 491, 492 (1908); Fry *v.* Stowers, 98 Va. 417, 422, 36 S. E. 482 (1900). *Contra*, Banaszek *v.* Mayer Boot & Shoe Co., 161 Wis. 404, 154 N. W. 637 (1915).

[24] Opinion of the Justices, 207 Mass. 606, 94 N. E. 846 (1911).

[25] Farrar *v.* Wheeler, 145 Fed. 482 (1906) (Cir. Ct. App.); Calaf *v.* Fernandez, 239 Fed. 795 (Cir. Ct. App.) (1917); Original 16–1 Mine *v.* 21 Mining Co., 254 Fed. 630 (Dist. Ct., N. D. Cal.) (1918).

[1] London St. Tramways Co. *v.* London County Council [1898], A. C. 375.

[2] Olympian Oil Cake Co. *v.* Produce Brokers Co., 112 L. T. R. 744 (1914).

[3] Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443 (1851); The Daniel Ball, 10 Wall. (U. S.) 557 (1870). See 33 HARV. L. REV. 458.

[4] Beinhorn *v.* Griswold, 27 Mont. 79, 69 Pac. 557 (1902).

[5] See Samuel C. Wiel, "Theories of Water Law," 27 HARV. L. REV. 530.